

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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RE: *Nikita Bernstein v. MyJoVE Corporation*,
C.A. No. 2021-0062-SEM

Dear Mr. Bernstein & Counsel:

I write in response to Mr. Bernstein's request for leave to file exceptions to my final report and the defendant's response in opposition.

My final report was issued during a teleconference on August 24, 2021.¹ I concluded my report by stating "exceptions may be filed under Court of Chancery Rule 144."² After addressing Mr. Bernstein's questions, I concluded the hearing by

¹ Docket Item ("D.I.") 81. Citations to the teleconference transcript, available at D.I. 81, are in the form "Tr. #."

² Tr. 19:16-17.

emphasizing “there is the exception timeline. There are 11 days to file a notice of exception. This is a final report. So, if exceptions are not filed, I will look for an implementing order to be filed, just to close out these proceedings. But we will need to hold it open for the 11-day exception period.”³

Mr. Bernstein contends he misunderstood my ruling and instructions and believed he had thirty (30) days to file a notice of appeal to the Delaware Supreme Court. Mr. Bernstein also represents that he was traveling and without internet or telephone access until after September 6th, the day before the 11-day exceptions period expired. Finally, Mr. Bernstein argues that his access to, and ability to review, the transcript of my ruling was delayed and, as such, he could not meet the 11-day deadline. The defendant argues that Mr. Bernstein has failed to present any justification for an extension and his request should be denied. I agree.

Mr. Bernstein was told that my ruling was a final master’s report and that Rule 144 allowed him to have the report reviewed by another judicial officer. Although I explained to Mr. Bernstein that there are rules through which he could seek “clarification, reconsideration, reargument” before me, I directed him to the Court of Chancery Rules and emphasized my role as a Master in Chancery and the exception process under Rule 144. Despite these directions, Mr. Bernstein failed to

³ Tr. 24:14-19.

file a notice of exceptions by September 7, 2021, and under Rule 144 is “deemed to have stipulated to the approval and entry of the report as an order of the Court.”⁴

Under Rule 6(b)(2), Mr. Bernstein’s request to enlarge the 11-day deadline, which was submitted after the deadline passed, can only be granted if “the failure to act was the result of excusable neglect[.]” Excusable neglect “focuses on two issues: (1) whether a party has demonstrated reasonable diligence; and (2) whether the opposing party will be improperly prejudiced by an extension.”⁵ “A finding of excusable neglect is appropriate when there is a ‘demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.’ Accordingly, excusable neglect is ‘neglect which might have been the act of a reasonably prudent person under the circumstances.’”⁶

Mr. Bernstein was directed to the Court of Chancery Rules and Rule 144 numerous times during the teleconference. He was informed, specifically, that Rule 144 had an 11-day deadline and that other rules permitting motions for “clarification,

⁴ The defendant points out that the exceptions period under Rule 144 is shortened for expedited cases. *See* Ct. Ch. R. 144(d)(2). This case was expedited but, because I expressly referenced the standard 11-day period when answering Mr. Bernstein’s questions, I hold Mr. Bernstein thereto.

⁵ *Mennen v. Fiduciary Tr. Int’l of Del.*, 167 A.3d 507, 511 (Del. 2016).

⁶ *Id.* at 512 (citations omitted).

reconsideration, reargument” had “strict deadlines,” and was encouraged “to look at them now if those are avenues you want to explore.”⁷ It appears Mr. Bernstein did not heed the Court’s warnings. Further, Mr. Bernstein’s argument that his travel precluded earlier action is unpersuasive; he was told the deadlines were strict and the exceptions deadline, in particular, was 11 days, but he failed to articulate any concerns about meeting those deadlines during the teleconference or in the weeks that followed. Finally, I struggle to appreciate how delayed access to the transcript (even assuming there was such a delay, and it was not caused by Mr. Bernstein) helps Mr. Bernstein’s argument; he was advised, in real-time, of the 11-day

⁷ See Tr. 22:14-20. Upon close review of the transcript, I have discovered two imprecisions that warrant discussion. First, I used the word “appeal” in response to one of Mr. Bernstein’s questions. Tr. 20:4-10. This was an ill-advised colloquialism meant to convey to Mr. Bernstein that he could challenge my decision before a constitutional officer of this Court through the exception process. Second, Mr. Bernstein asked about his avenues for challenging my decision and used the word “appeal” in his question. Tr. 21:18-22. In response, I told Mr. Bernstein I could not give him legal advice but that the avenues he articulated seemed “open to” him. Tr. 21:23-22:1. I can see how these two responses, in isolation, may lead to confusion. Were these my only instructions to Mr. Bernstein, I might find a reasonable basis for his confusion and noncompliance. But the remainder of the transcript contains numerous clarifications of this earlier imprecision. For example, my reference to “appeal” was followed immediately by the qualifier “higher up in the court via Rule 144, which is the process for exceptions to be filed to my recommendation” and I directed Mr. Bernstein numerous times to the Court of Chancery Rules, Rule 144, and told him explicitly he had 11 days to file a notice of exceptions. See Tr. 19:16-17; Tr. 20:4-10; Tr. 22:12-22; Tr. 24:13-19. Under these circumstances, I find a reasonably prudent person in Mr. Bernstein’s shoes, acting in good faith, would have reviewed the Court of Chancery Rules and followed the exception process therein or sought appropriate leave before the 11-day deadline.

exception deadline and a reasonably prudent person would have acted promptly to comply or sought leave in advance if he could not comply. Mr. Bernstein has failed to demonstrate reasonable diligence, good faith, or some reasonable basis for his failure to timely file a notice of exceptions under Rule 144. The request for an extension of time to file a notice of exceptions should be denied.

This is a final report under Rule 144. Exceptions to this report are stayed until a final report is issued on the pending motion for attorneys' fees and costs. The defendant shall file a reply in further support of its motion for attorneys' fees and costs by October 22, 2021.

Respectfully,

/s/ Selena E. Molina

Master in Chancery